**BACOM ENTERPRISES SDN BHD**

**v.**

**JONG CHUK & ORS**

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABDUL MALEK AHMAD JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: Q-02-500-1997]
16 MARCH 1998

***CIVIL PROCEDURE:*** *Pleadings - Amendment of - Statement of defence - Application to reamend amended statement of defence and counterclaim - Discretion of judge - Whether amendment causes injustice or prejudicial to the other party - Whether can be compensated by costs - Addition of new cause of action through amendments - Rules of the High Court 1980, O. 20 r. 3(1)*

***CIVIL PROCEDURE:*** *Amendment - Addition of new cause of action - Whether to allow amendments - Whether appellant may have second opportunity to improve its case by bringing in new issues - Whether prejudicial to 1st respondent - Whether can be compensated by costs - Whether appellant may be allowed to relitigate case to realign defence - Unnecessarily delayed and protracted litigation*

The appellant herein was the 6th defendant as well as the third party in the court below, whilst the 1st respondent and the 2nd to 6th respondents herein were the plaintiff and the 1st to 5th defendants respectively in the court below. The instant appeal by the appellant was from the decision of the High Court dismissing its application to reamend its amended statement of defence and counterclaim.

The 1st respondent had earlier entered into an agreement with the 2nd to 6th respondents to develop a piece of land. Subsequently, however, the 2nd to 6th respondents transferred the said land to the appellant. Aggrieved, the 1st respondent brought an action ('the main action') against the 2nd to 6th respondents and the appellant. The 2nd to 6th respondents then brought the appellant in as a third party. After the 1st respondent and the 2nd to 6th respondents had closed their cases, the 2nd to 6th respondents applied to amend their statement of claim against the appellant in the third party proceedings. The learned judge allowed this application, and also granted the appellant leave to amend its statement of defence in the third party proceedings.

Thereafter, in another application, the 1st respondent was also granted leave to amend his statement of claim in the main action. As a result of this, the appellant applied to have its amended defence and counterclaim reamended. This application was dismissed, and hence, the instant appeal.

**Held:**
**Per Mokhtar Sidin JCA**

**[1]** The exercise of the power to grant or refuse leave for the amendment of pleadings at any stage of a proceeding is at the discretion of the judge. This power must always be exercised judicially, having regard to the prevailing practice and the question whether the amendment sought, if allowed, will prejudice or cause injustice to the other party which cannot be compensated by costs (bearing in mind that justice is not easily measurable in terms of money).

**[1a]** Where the amendment sought causes no injustice or prejudice, it should be allowed. Therefore, each application for amendment must be decided on its own merits.

**[2]** The amendment applied for by the 1st respondent and allowed by the learned judge was only in respect of one paragraph ('para 26') in the 1st respondent's statement of claim. In contrast, the proposed reamendment by the appellant was in respect of 90% of the appellant's amended statement of defence. Furthermore, the proposed reamendment had sought to introduce two entirely new issues which were not amongst the substantive issues to be tried as had been agreed to by all the parties.

**[2a]** As a matter of principle, the learned judge, having allowed the 1st respondent to amend his statement of claim against the appellant, should have also allowed the appellant to reamend its amended statement of defence and counterclaim, but **strictly** in so far as the proposed reamendment replied to para 26. To allow the proposed reamendment in toto would be to give the appellant a second opportunity to improve its case by bringing in the two new issues which were not consequential amendments after the 1st respondent had closed his case. This would be prejudicial to the 1st respondent and might not be compensated by costs. The appellant must not be allowed to relitigate its case to realign its defence at this very late stage; otherwise, litigation would be unnecessarily protracted and delayed.

*[Appeal allowed in part.]*

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu di sini adalah merupakan defendan ke-6 dan juga pihak ketiga dalam mahkamah di bawah, sedangkan responden pertama dan responden-responden ke-2 hingga ke-6 di sini merupakan plaintif dan juga defendan-defendan pertama dan ke-5 masing-masingnya dalam mahkamah di bawah. Rayuan semasa ini oleh perayu ialah terhadap keputusan Mahkamah Tinggi yang menolak permohonannya untuk meminda semula pernyataan pembelaan terpindanya dan tuntutan balas.

Responden pertama telah pada awalnya memasuki satu perjanjian dengan responden-responden ke-2 hingga ke-6 untuk memajukan sebidang tanah. Berikutan itu, walaubagaimanapun, responden-responden ke-2 hingga ke-6 telah memindahkan tanah tersebut kepada perayu. Responden pertama yang rasa terkilan telah memulakan satu tindakan ('tindakan utama') terhadap responden-responden ke-2 hingga ke-6 dan perayu. Responden-responden ke-2 hingga ke-6 kemudiannya telah membawa perayu masuk sebagai pihak ketiga. Selepas kedua-dua responden pertama dan responden-responden ke-2 hingga ke-6 menutup kes mereka, responden-responden ke-2 hingga ke-6 telah memohon untuk meminda Pernyataan Tuntutan mereka terhadap perayu dalam prosiding pihak ketiga. Hakim yang bijaksana telah membenarkan permohonan ini, dan juga memberikan kebenaran kepada perayu untuk meminda pernyataan pembelaannya dalam prosiding pihak ketiga.

Kemudiannya, dalam satu lagi permohonan yang lain, responden pertama telah juga diberikan kebenaran untuk meminda pernyataan tuntutannya dalam tindakan utama tersebut. Akibatnya, perayu telah memohon untuk meminda semula pembelaan terpinda dan tuntutan balasnya. Permohonan ini telah ditolak, dan dengan itu, mengakibatkan rayuan semasa ini.

**Diputuskan:**
**Oleh Mokhtar Sidin HMR**

**[1]** Perlaksanaan kuasa untuk memberikan atau menolak kebenaran untuk meminda pliding-pliding di mana-mana peringkat bagi sesuatu prosiding adalah terletak pada budibicara hakim. Kuasa ini mestilah selalu dilaksanakan secara perundangan, dengan memberikan pertimbangan pada amalan semasa dan persoalan samada pindaan yang dipohon, jika dibenarkan, akan memudaratkan atau menyebabkan ketidak-adilan kepada pihak lain yang mana tidak boleh digantirugi dengan kos (dengan mengingati bahawa keadilan tidak mudah diukur menurut wang).

**[1a]** Di mana pindaan yang dipohon tidak menyebabkan ketidak-adilan atau kemudaratan, ianya haruslah dibenarkan. Dengan itu, setiap permohonan untuk pindaan mestilah diputuskan berdasarkan meritnya yang tersendiri.

**[2]** Pindaan yang dipohon oleh responden pertama dan dibenarkan oleh hakim yang bijaksana adalah hanya berhubung satu perenggan ('perenggan 26') dalam Pernyataan Tuntutan responden pertama. Bertentangan dengan itu, pindaan semula yang dicadangkan oleh perayu adalah berhubung 90% dari pernyataan pembelaan terpinda perayu. Selanjutnya, pindaan semula itu telah cuba untuk memperkenalkan dua isu yang baru sama sekali yang mana bukannya antara isu-isu substantif untuk dibicarakan sepertimana yang telah dipersetujui oleh kesemua pihak.

**[2a]** Sebagai prinsip, hakim yang bijaksana, setelah membenarkan responden pertama meminda Pernyataan Tuntutannya terhadap perayu, seharusnya juga membenarkan perayu meminda semula pernyataan pembelaan terpinda dan tuntutan balasnya, tetapi tegasnya sejauhmana pindaan semula yang dicadangkan yang menjawab perenggan 26. Membenarkan pindaan semula yang dicadangkan itu in toto bermakna memberikan perayu peluang kedua untuk memperbaiki kesnya dengan memasukkan dua isu baru yang bukan merupakan pindaan sampingan selepas responden pertama menutup kesnya. Ini mungkin akan memudaratkan responden pertama dan tidak dapat digantirugi dengan kos. Perayu tidak seharusnya dibenarkan untuk melitigasikan semula kesnya untuk menyelaraskan pembelaannya di peringakt selewat ini, jika tidak, litigasi akan secara tidak perlu berlarutan.

*[Rayuan dibenarkan sebahagiannya.]*

**Cases referred to:**
*Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361* ***(refd)***
*Alloy Automotive Sdn Bhd v. Perushaan Ironfield Sdn Bhd [1986] MLJ 382* ***(cit)***
*Ketteman & Ors v. Hansel Properties Ltd [1988] 1 All ER 38* ***(foll)***
*Ratnam v. Cumarasamy & Anor [1965] 31 MLJ 228* ***(cit)***
*Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd [1983] 1 MLJ 213* ***(refd)***

**Legislation referred to:**
Rules of the High Court 1980, O. 20 r. 3(1)

*[Appeal from High Court, Kuching; Suit No: KG 104 of 1994(II)]*

*For the appellant - DP Naban (KJ Foo with him); M/s Tan & Lai*
*For the 1st respondent - Wong Kim Fatt (Albert Tang with him); M/s Chew, Jugah, Wan Ullok & Co*
*For the 2nd - 6th respondents - Fabian Lim Ann Hoaw; M/s Lim & Lim*

*Reported by Gan Peng Chiang*

**JUDGMENT**

**Mokhtar Sidin JCA:**

We have given our decision earlier and we now give our reasons for doing so.

This is an appeal by the appellant, Bacom Enterprises Sdn. Bhd. who as the sixth defendant is also the third party in the court below. The 1st respondent here (Jong Chuk) is the plaintiff in the court below. The 2nd to the 6th respondents are the 1st to 5th defendants in the court below. The identification of the various parties is necessary so as to understand the issue on appeal and to avoid any confusion.

The appeal is against the decision of the learned trial judge made in the High Court at Kuching on 6 August 1997. The learned judge had on that day dismissed the application by the appellant to reamend its amended statement of defence and counterclaim and adjourned the appellant's application for the recall of the 1st respondent and other witnesses for further cross-examination after the respondents had closed their cases.

The facts are as found in the statement of agreed facts (AR 148-153). On 22 October 1991 the 1st respondent entered into an agreement with the 2nd to 6th respondents to develop a piece of land known as Lot 29, Block 218, measuring about 1.23 hectares, Kuching North Land District, owned by them jointly at the material time, upon the terms and conditions stated in the said agreement. On 26 May 1993, the 2nd to 6th respondents transferred the said land to the appellant. On 14 May 1994 the appellant notified the 1st respondent of the revocation of his power of attorney and instructed the 1st respondent to vacate the said land within 24 hours. On the same day, the appellant notified the authorities concerned that it did not wish to proceed with anything the 1st respondent had undertaken. This prompted the 1st respondent to file Civil Suit No. KG 104 of 1994(II), in the High Court at Kuching against the 2nd to 6th respondents and the appellant, from which the present appeal arose. The 2nd to 6th respondents also brought in the appellant as the third party. The trial of the civil suit commenced on 11 November 1996. The 1st respondent (as the plaintiff) and his witnesses gave evidence in court and closed its case

on 14 November 1996. On 16 November 1996, the 2nd to 6th respondents closed their case. On 5 March 1997 the 2nd to 6th respondents made an application to amend their statement of claim against the appellant in the third party proceedings. That application was allowed by the learned judge who heard the suit and pursuant to that the appellant was also given leave to amend his statement of defence in the third party proceedings.

In another application the 1st respondent was given leave to amend its statement of claim in the main suit. As a result of that the appellant applied to have its amended defence and counterclaim reamended. On the objection by the 1st respondent the application by the appellant was dismissed by the learned judge. Hence, the present appeal.

It is pertinent to note that the amendment applied for by the 1st respondent and allowed by the court was only in respect of para. 26 of the 1st respondent's statement of claim which is as follows:

> 26. Further and in the alternative, the 6th defendant, well knowing at all material times that the said Agreement had been entered into by the Plaintiff with the 1st, 2nd, 3rd, 4th and 5th Defendants as aforesaid, wrongfully and with intent to injure the Plaintiff, procured and induced the said 1st, 2nd, 3rd, 4th and 5th Defendants to breach their Agreement with the Plaintiff and to refuse to perform or further perform the same.
>
> (1) Inducing the 1st, 2nd, 3rd, 4th and 5th defendants to sell the said Land to the 6th defendant surreptitiously and further inducing them to revoke the Power of Attorney dated 25th day of January 1992.
>
> (2) Falsely and/or fraudulently representing to the Original Landowners that the 6th defendant would honour and abide by the said Agreement and the Deed when it never had any real intention to do so as it had a separate plan to develop the said land into a water/family theme park.

We noted that the proposed reamendments by the appellant (at pp. 122-137 of AR) amended some 90% of the appellant's amended statement of defence. It is not confined to the defence of para. 26 of the 1st respondent's statement of claim as amended above. It was submitted by Mr. D.P. Naban, learned counsel for the appellant that the proposed reamendments were merely consequential amendments and for clarifications. As such the learned judge had erred when he refused the application. Mr. Wong Kim Fatt, learned counsel for the 1st respondent, quite properly conceded that had the appellant confined its consequential amendments in reply to the amended para. 26 of the statement of claim, the appellant's application would be difficult to resist. Our attention was drawn to the proposed reamended defence and counterclaim

of the appellant where it was shown that the appellant had amended virtually every paragraph of the statement of defence and counterclaim. In addition to that, as pointed out by Mr. Wong, the appellant had introduced two entirely new issues of breach and anticipatory breach on the part of the 1st respondent which were not issues to be tried as agreed before and stated by all the parties in the substantive issues to be tried. Mr. Wong submitted that the learned judge was correct in refusing to grant leave to the appellant to reamend the amended statement of defence and counterclaim. Mr. Wong further submitted that if leave were to be given to the appellant, it should only be confined to para. 18 of the proposed reamended statement of defence and counterclaim which is in reply to the amended para. 26 of the statement of claim of the 1st respondent.

In respect of the right of parties to amend their pleadings, we should make reference to O. 20 of the Rules of the High Court 1980 in particular r. 3(1) and some general principles relating to amendment of pleadings. Rule 3(1) of the High Court Rules 1980 is the same as O. 20 r. 3(1) of the English Rules of the Supreme Court 1979. Order 20 r. 3(1) provides as follows:

> **Order 20 r. 3(1).** A party may, without the leave of the court, amend any pleading of his once at any time before the pleadings are deemed to be closed and, where he does so, he must serve the amended pleading on the opposite party.

Generally speaking, the exercise of the power to grant or refuse amendment of pleadings at any stage of the proceedings is in the discretion of the judge, but the power must always be exercised judicially having regard to the prevailing practice and whether the amendment sought by one party, if allowed would cause injustice or prejudice to the other party which cannot be compensated by costs, bearing in mind that it is not always easy to measure justice in terms of the money. Where the amendment causes no injustice or prejudice, it should be allowed. Each application must therefore be decided on its own merit. In *Abdul Johari Abdul Rahman v. Lim How Chong & Ors.* [1997] 1 CLJ 361; the original pleadings were based on the principles of equity, and this court through Abdul Malek Ahmad JCA, in dismissing the appeal and confirming the order granting the amendment, said at p. 374 as follows:

> The authorities strongly indicate that the courts should lean in granting applications for amendments even when a new cause of action or line of defence is raised provided it is based on the same facts or arose out of the same transaction subject, however, to an award of costs to the other party for the injustice caused by the amendments. On these considerations, we agree with

> the learned judge that as far as the amendments were concerned, there is no basic departure from the original pleadings which were grounded on the principles of equity. The sudden change applied for from 30 to 35 years respectively to 99 years is of course not yet explained but a trial would certainly determine all issues and the appellant cannot be said to be really prejudiced if the amendments were allowed except on his objection that the existing lease, as originally pleaded by the fifth respondent in particular and not pleaded at all by the first, third, fourth and sixth respondents, is only for three years commencing in September or October 1992 which would have ended a year ago. However, there is no written tenancy apart from the averments in the original pleadings and that was actually an oral agreement between the vendor and the fifth respondent at around the same time the said premises were being sold to the appellant.

In *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd.* [1983] 1 MLJ 213, which was cited with approval by the former Supreme Court in *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] MLJ 382, Mohd. Azmi FJ, in delivering the judgment of the former Federal Court, stated the general principle at p. 214:

> Under O. 20 of the Rules of the High Court 1980, which is equivalent to O. 28 Rules of Supreme Court, a judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially (see *Kam Hoy Trading v. Kam Fatt Tin Mine*). The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide*; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. (See *Mallal's Supreme Court Practice* p. 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim. In this appeal it is unfortunate that the learned judge had failed to set out anywhere in the appeal records the factor or factors which he had taken into consideration in the exercise of discretion to dismiss the appellants' application. We must therefore review the application afresh.

Although in the present appeal the learned trial judge had the discretion whether or not to grant the appellant's application for the amendment, and there is a presumption that he was right in the exercise of his discretion (see *Ratnam v. Cumarasamy & Anor* [1965] 31 MLJ 228), we sitting as an appellate court, can review and interfere with the exercise of his discretion if we are satisfied that the learned judge had erred in principle.

In the present appeal we are of the opinion that, as a matter of principle, the learned judge, having allowed the 1st respondent to amend his statement of claim against the appellant, should have also allowed the appellant to amend its statement of defence and counterclaim strictly in reply to para. 26 of the statement of claim. As such in this connection we are of the view that the learned judge should have allowed the amendment as contained in para. 18 which is in response to the amended para. 26 of the 1st respondent's amendment to para. 26 of the statement of claim. The proposed amended para. 18 reads as follows:

> 18. Paragraph 26 and all the particulars therein of the Re-Amended Statement of Claim are denied and the plaintiff is put to strict proof thereof. No inducement or procurement surreptitious or otherwise was ever used by the 6th defendant in the manner alleged or in any manner howsoever or at all. Further, the 6th defendant makes the following averments:
>
> (a) that the 6th defendant had approached both the plaintiff and the Original Landowners in a *bona fide* manner;
>
> (b) that the Original Landowners were willing and intending to dispose of ownership of the said Land;
>
> (c) that the Original Landowners have represented to the 6th defendant that the plaintiff required the 6th defendant to furnish to the plaintiff a second Power of Attorney on terms identical to the first Power of Attorney in order that the terms and conditions of the said Agreement may be performed;
>
> (d) The second Power of Attorney was granted and executed on the same date as the transfer of the said Land was effected from the Original Landowners to the 6th defendant;
>
> (e) that there never was a separate plan to develop a water/family theme park;
>
> (f) further or alternatively, if there ever was such a separate plan (which is denied) it is irrelevant to these proceedings.

However, we are of the opinion, that the learned judge was right in refusing to allow all the other amendments sought to by the appellant. We have examined the proposed reamended 16 page statement of defence and counterclaim of the appellant. We found that virtually every paragraph from para. 1 to para. 31, is substantially amended from top to bottom. There are new allegations of breach against the 1st respondent in the new paras. 3 and 4 in the reamended statement of defence. These amendments are certainly not consequential amendments. We agree with the learned trial judge when he said,

"Upon perusing through the Re-Amended Defence and Counterclaim as shown in encl. 141, it is abundantly clear that the 6th defendant undertook a major exercise to re-amend the Defence and Counterclaim." – Thus to allow reamendments in toto, is in our opinion to give the appellant the second opportunity to improve its case by bringing in two new issues of breach and anticipatory breach on the part of the 1st respondent after he had closed his case. Clearly, this would be against and prejudicial to the 1st respondent, which cannot be compensated by costs. It is far too late in the day for the appellant to raise the two new issues in its defence. If these new issues were allowed to be raised at this very late stage of the proceedings after the 1st respondent had closed his case, it would mean that the appellant is allowed to relitigate its case to realign its defence to meet the case of the 1st respondent. Such a practice is undesirable in present day litigation; otherwise litigation can be delayed or protracted unnecessarily to the prejudice of the party affected. The appellant must be denied a second bite of the cherry. Apart from our opinion relating to para. 18 of the reamended defence, we would endorse the following observations of the learned trial judge in his judgment (at pp. 5 and 6 of the judgment):

> Evidently, in the instant case, if the court accedes to the request of the 6th defendant for leave to re-amend the Defence and Counterclaim, the plaintiff surely will be prejudiced as a result since both the plaintiff and the 1st to 5th defendants had already closed their case. The two more important issues raised by the 6th defendant are essentially new averments not anticipated by the plaintiff and also not consequential upon the order of the court dated 17 April 1997.

In this connection, it is pertinent to refer to the following passages in the judgment of Lord Griffiths in the case of *Ketteman and Others v. Hansel Properties Ltd.* [1988] 1 All ER 38. This is a decision of the House of Lords and at p. 62 his Lordship said:

> Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.

> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings.

For the reasons we have stated, we therefore made an order that the appellant be allowed to reamend its amended statement of defence and counterclaim only in terms of para. 18 of the proposed reamended statement of defence and counterclaim as stated above. No other amendments are allowed.

In the circumstances, there was really no purpose for Mr. Naban to proceed with his appeal against the learned judge's order or discretion to defer the hearing of his application to recall the 1st respondent and other witnesses for the purpose of further cross-examination. We will leave this matter to the discretion of the learned judge who has the conduct of the proceedings in his court. There will be no order as to costs here and the court below in respect of the amendment application by the appellant. The trial will continue before the learned judge.